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Steven L. Harris

IIT Chicago-Kent College of Law, sharris@kentlaw.iit.edu

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Choosing the Law Governing Perfection: The Data and Politics of Article 9 Filing

Steven L. Harris

Charles W. Mooney, Jr.*

In his valuable contribution to this Symposium, Lynn LoPucki makes a case for revising Article 9 to provide that the proper place for filing a financing statement against a corporate debtor is the jurisdiction under whose law the debtor is incorporated.¹ He marshals data that provide powerful support for his proposal and effectively blunt anticipated criticisms. We are pleased to see this article, not only because we are inclined to agree with its conclusion, but also because its appearance supports one of the strengths of the UCC revision process.

As LoPucki acknowledges, his article is a direct outgrowth of a process that began with the establishment of the Permanent Editorial Board UCC Article 9 Study Committee.² He first publicly floated the idea of an incorporation-based choice-of-law rule

* The authors are, respectively, Professor of Law, University of Illinois College of Law, and Professor of Law, University of Pennsylvania Law School. They serve as Reporters for the Drafting Committee to Revise UCC Article 9 ("Drafting Committee") and were the Reporters for the Permanent Editorial Board UCC Article 9 Study Committee ("Study Committee"). The views expressed in this paper are not necessarily those of the Drafting Committee, the Study Committee, or any of the sponsors of either (the Permanent Editorial Board, the American Law Institute, or the National Conference of Commissioners on Uniform State Laws).

1. Lynn M. LoPucki, *Why the Debtor's State of Incorporation Should Be the Proper Place for Article 9 Filing A Systems Analysis*, 79 MINN. L. REV. 577 (1995). Although LoPucki's proposal encompasses not only corporations but also limited partnerships, limited liability companies, and other chartered entities ("registered entities"), his discussion proceeds primarily in the context of corporate debtors. *Id.* at 581. We follow his practice.

2. *Id.* at 583-84. The Permanent Editorial Board established the Study Committee in early 1990. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 9: REPORT 1 (1992) [hereinafter PEB REPORT]. The *Report* describes the reasons for and background of the study and the organization, operation, and general approach of the Committee. *Id.* at 1-9. The Study Committee recommended that the UCC's sponsors create a drafting committee for the revision of Article 9. *Id.* at 10-11. The sponsors responded positively and created the Drafting Committee in 1993. We expect that a revised Article 9 will be promulgated in 1997.

in May 1993, at an Invitational Symposium sponsored by the American Law Institute-American Bar Association Committee on Continuing Professional Education. LoPucki was among a select group of established and knowledgeable practitioners and academics who were invited to participate in a wide-ranging discussion of the Study Committee's *Report*.³ The primary purposes of the *Report* were to recommend to the sponsors of the UCC whether Article 9 is in need of revision and, if so, to recommend the nature and substance of the revisions.⁴ But, as LoPucki's article suggests, the *Report* served as well to stimulate discussion of various proposals for revision.⁵

IMPROVING UPON ARTICLE 9's BIFURCATED CHOICE-OF-LAW RULE

The Study Committee's *Report* expressed dissatisfaction with the current choice-of-law system. Under this system, the law of the jurisdiction where the collateral is located governs perfection for most tangible collateral, whereas the law of the jurisdiction where the debtor is located governs perfection for most intangibles.⁶ In explaining the desirability of a single choice-of-law rule applicable to both tangible and intangible collateral, the *Report* observed that following two rules often results in multiple filings for a single transaction.⁷ The two-rule regime also jeopardizes security interests in proceeds and creates priority problems that a single rule would minimize and, in some cases, even eliminate.⁸

3. Because LoPucki is widely regarded as not terribly sympathetic to secured creditors, the mixed reaction his idea received is some indication that the alleged "capture" of the revision process by representatives of secured parties is overstated.

4. PEB REPORT, *supra* note 2, at 1.

5. LoPucki, *supra* note 1, at 584. Discussions are continuing under the auspices of the American Bar Association and the American Law Institute, through the National Conference of Commissioners on Uniform State Laws, and various state and local bar associations, as well as among the advisors and observers of the Drafting Committee.

6. "A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence." U.C.C. § 9-103(3)(d) (1990).

7. PEB REPORT, *supra* note 2, at 75. For example, financiers commonly take a security interest in both inventory and accounts. The law of the location of the collateral governs where to file a financing statement with respect to inventory. U.C.C. § 9-103(1)(b). The law (including the conflict-of-laws rules) of the jurisdiction where the debtor is located governs where to file with respect to accounts. *Id.* § 9-103(3)(b).

8. PEB REPORT, *supra* note 2, at 75.

Several considerations led the Study Committee to conclude that the single choice-of-law rule should turn on the location of the debtor and not the location of the collateral.⁹ First, intangible collateral has no location. A location-of-collateral rule would require a provision fixing a fictional location for intangibles.¹⁰ Second, collateral may be located in many jurisdictions, whereas each debtor has only one location (and, perhaps, one or two other candidates for its location). As a consequence, a debtor's-location rule would likely result in fewer filings, thereby lowering the cost of credit. Third, a debtor's-location rule probably would not need special provisions governing collateral in transit.¹¹ Finally, because debtors are unlikely to change locations as frequently as does collateral, a debtor-based rule would likely reduce the costs of maintaining perfected status and the frequency with which certain difficult priority issues arise.

The *Report* candidly acknowledged that a single choice-of-law rule based on the location of the debtor is not a complete solution to choice-of-law problems, even though it would reduce many costs and much complexity.¹² Because debtors sometimes change their location, a debtor-based rule would not eliminate all the costs and priority problems that accompany or result from changes in the fact that determines the applicable law. The *Report* also identified several problems that might accompany a shift from the current mixed choice-of-law regime (collateral- and debtor-based, depending on the type of collateral) to a single, debtor-based rule.¹³

CHOICE-OF-LAW BASED ON THE JURISDICTION OF THE DEBTOR'S INCORPORATION

LoPucki approves of and builds upon the Study Committee's recommendations that Article 9 be revised to provide a single choice-of-law rule and that the rule be tied to the debtor, rather than the collateral.¹⁴ He brings to the discussion a new and im-

9. *Id.* at 76.

10. A rule that located intangibles at the debtor's location would replicate the existing system.

11. *See, e.g.*, U.C.C. § 9-103(1)(c) (governing purchase money security interests in collateral that the parties understand will be kept in another state).

12. PEB REPORT, *supra* note 2, at 77.

13. *Id.* We discuss some of these problems. *See infra* notes 34-59 and accompanying text (discussing the variety of adverse implications associated with the change to a debtor-based rule).

14. PEB REPORT, *supra* note 2, § 9.A. The Study Committee's recommendations were not novel. They were in accord with those of others who previously had considered the issue. *See, e.g.*, RUSSELL J. WEINTRAUB, COMMENTARY

portant twist, suggesting that the governing law be that of the jurisdiction under whose law the debtor is incorporated rather than the jurisdiction in which the debtor's chief executive office is located.¹⁵ LoPucki does not limit his analysis to the question of whether an incorporation-based choice-of-law rule is preferable to one based on the location of the debtor's chief executive office. His paper also illuminates the larger question of the desirability of switching from a mixed choice-of-law regime to a single choice-of-law rule.

At least insofar as it relates to the law governing perfection,¹⁶ this larger choice-of-law question is, in turn, but one aspect of an overriding issue in the revision process: How to minimize the aggregate costs of the filing system.¹⁷ LoPucki's principal claim is that "[t]he benefits of the change to an incorporation-based system will be principally in the form of lower total systems costs and greater accuracy," and his proposal should be assessed on this basis.¹⁸ We do not share LoPucki's concern that a particular rule might permit filers to externalize certain costs by shifting them to searchers, or vice versa.¹⁹ As a practical matter, filers, searchers, and debtors are unable to bargain among themselves to reallocate the costs of the filing system. Regardless of how Article 9 allocates the costs between filers and searchers, each group can shift the loss to its customers. Ultimately, debtors and potential debtors will bear both the costs of

ON THE CONFLICT OF LAWS § 8.42, at 503-04 (3d ed. 1986) (promoting the merits of a debtor-based rule); Peter F. Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 556-57 (1973) (arguing that a debtor-based rule would eliminate problems created by the location-of-collateral approach); Friedrich K. Juenger, *Nonpossessory Security Interests in American Conflicts Law*, 84 COM. L.J. 63, 74 (1979) (advocating a debtor-based rule except for cars or fixtures).

15. LoPucki contrasts his proposal, filing "where the debtor is incorporated," with the current regime, under which one files "where the debtor is located" or "where the collateral is located." LoPucki, *supra* note 1, at 585-93. Because the location of a corporation is a legal fiction, we would phrase the issue in terms of whether Article 9 should deem a corporation to be located at its chief executive office or in the jurisdiction of its incorporation.

16. Under § 9-103, the law governing perfection of security interests also governs "the effect of perfection," which many understand to mean the relative priority of a security interest as against other claims to the collateral. U.C.C. § 9-103(6) (1994). A 1994 amendment to § 9-103(6) distinguishes between the law governing perfection and the law governing priority with respect to securities. *Id.*

17. The aggregate costs include those imposed upon both secured and unsecured creditors, as well as upon buyers and transferees of the collateral and other interested persons who consult the UCC filing records.

18. See LoPucki, *supra* note 1, at 652.

19. See *id.* at 601.

filing (or choosing not to file) and the costs of searching (or deciding not to search). No advantage is necessarily gained by creating rules that, in the first instance, impose upon the filer the costs of its own errors. The goal instead becomes one of reducing the aggregate costs of both aspects of the filing system.

Cost reduction is not the only goal of the revision process. The purpose of the National Conference of Commissioners on Uniform State Laws (NCCUSL), one of the sponsors of the UCC, is "to promote uniformity in the law among the several States."²⁰ Especially in light of the general acceptance of existing Section 9-103,²¹ the Article 9 Drafting Committee is unlikely to approve any change to the section that it believes is likely to impair significantly the chances of enactment or to result in non-uniform amendments.²²

The Study Committee's *Report* outlines some of the potential cost savings that might result from switching to a single choice-of-law rule determined by the location of the debtor's chief executive office. LoPucki argues, in essence, that an incorporation-based choice-of-law rule would afford all the benefits of moving to a chief executive office rule and then some.

The advantages of linking the location of a corporate debtor to its jurisdiction of incorporation rather than to its chief executive office cannot be denied. Once one has identified the debtor, the jurisdiction of incorporation is certain and easy to confirm from the public record; the location of the chief executive office is less certain and depends on private facts that may be costly to verify.²³

20. CONSTITUTION OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS § 1.2 (1988).

21. There have been very few nonuniform amendments to § 9-103.

22. Among NCCUSL's policies is the following: "(a) Every act drafted by the Conference shall conform to the following requirements: . . . (2) there shall be a reasonable probability that the act, when approved, either will be accepted and enacted into law by a substantial number of jurisdictions or, if not, will promote uniformity indirectly." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS ¶ 2(a)(2) (1988). To the extent that nonuniformity imposes net costs, the goal of uniformity is one aspect of the goal of cost reduction.

23. LoPucki makes much of this uncertainty, some of which the official comment creates. LoPucki, *supra* note 1, at 594-97. The Study Committee's *Report* acknowledged the uncertainty but observed that "[a]lthough the term [chief executive office] is not defined, the lack of definition does not appear to have caused significant problems." PEB REPORT, *supra* note 2, at 76 n.8. Presumably, the uncertainty, whatever its degree, could be ameliorated by carefully redrafting the statute and the official comments. Nevertheless, LoPucki's

POST-TRANSACTION CHANGES UNDER AN INCORPORATION-BASED CHOICE-OF-LAW RULE

The incorporation-based system may not be quite so simple as it first appears. For example, the rule may have to take account of corporations that dissolve. Because the consequences of dissolution differ from state to state, a complex provision may be needed to deal with the variations. As LoPucki suggests, an incorporation-based choice-of-law rule is likely to be useful not only for corporations but also for other "registered entities."²⁴ More thought must be given to the applicability of the "jurisdiction of incorporation" rule to entities other than state-chartered corporations.²⁵ In particular, care must be taken to assure that no "registered entity" can be chartered by more than one jurisdiction. And, unless Congress establishes a federal filing system for federally chartered entities, the choice-of-law rule governing security interests created by some registered entities will differ from that governing security interests created by others.²⁶ In any event, the definition of "registered entity" will raise some questions at the margin. These and other issues deserve further study; we suspect, however, that they will prove trivial when compared with the increased certainty that would result from abandoning the chief executive office as a determinant of the applicable law.

We agree with LoPucki that the costs of discovering and responding to changes in the jurisdiction whose law governs perfection are likely to be lower in an incorporation-based system than under a rule that turns on the location of the debtor's chief executive office. A change in the jurisdiction of incorporation is a matter of public record and occurs at a definite time.²⁷

point is well taken: The jurisdiction of incorporation is more certain and easier to verify than is any undefined "chief executive office" or any redefined "chief executive office."

24. For a working definition of "registered entity," see LoPucki, *supra* note 1, at 581 n.12.

25. The 1977 amendments to § 9-103 use the phrase "jurisdiction of organization." See U.C.C. § 9-103(6) (1977). One of the new choice-of-law provisions applicable to securities uses the phrase "jurisdiction under which the issuer of the security is organized." U.C.C. § 8-110(d) (1994).

26. It will be necessary to specify the applicable law in the case of federally-chartered entities. We think it unlikely, however, that states would adopt a uniform text that deems a specified jurisdiction (say, Washington, D.C.) to be the home of all federally-chartered entities. Another alternative for federally-chartered entities would be the jurisdiction where the chief executive office is located, as under current UCC § 9-103(3).

27. Following LoPucki, we use the phrase "change in the jurisdiction of incorporation" to refer to a reincorporation. Although the purpose and practical

A debtor may change its chief executive office through the accretion of otherwise insignificant private events, thus making the moment of change—a legally significant event—impossible to pinpoint.²⁸ An incorporation-based rule may reduce significantly the monitoring costs that arise from the current need to reperfect if the debtor relocates its chief executive office or reincorporates.²⁹

To some degree, our assessment of these monitoring costs differs from LoPucki's. For example, we agree that an incorporation-based rule could eliminate the need to monitor for corporate restructurings, but we think that revisions to Article 9 would be insufficient to accomplish that goal. LoPucki assumes that the change in choice-of-law rules would be accompanied by a revised section 9-402(7), under which a filed financing statement would remain effective if the debtor corporation changes its name or even merges out of existence.³⁰ He suggests that this new rule would eliminate the need for a secured party who files properly in the jurisdiction of incorporation to monitor for subsequent mergers.³¹ But a merger, particularly one in which the debtor merges out of existence, poses risks that may dwarf the loss of perfected status. Even if a filing were to remain effective following a reincorporation, secured parties would be likely to take steps to discover whether the debtor has merged. These steps might include checking the publicly available corporate records periodically to discover whether particular debtors had undergone corporate changes.

An incorporation-based choice-of-law rule might facilitate the transmission of relevant information to secured parties and thereby obviate the need for periodic searches, a point that LoPucki seems to overlook. For example, once a state links its corporate and UCC records, the filing office might, for a fee, rou-

effect of a reincorporation are to change the domicile of a corporation, as a legal matter a reincorporation consists of the organization of a new corporation and the subsequent merger of the old corporation into the new. Legally, the old corporation does not change its jurisdiction of incorporation; rather, it ceases to exist. The new (surviving) corporation remains liable for debts incurred by the old one.

28. LoPucki, *supra* note 1, at 590-91.

29. *Id.* at 611-14. The incorporation-based system also provides a means for error trapping. *Id.* at 603.

30. *Id.* at 614. Although LoPucki treats a reincorporation as a name change, a reincorporation terminates the existence of an original corporation. See *supra* note 27 and accompanying text (discussing the legal effect of reincorporation). We prefer to think of reincorporations not as name changes but rather as transfers of collateral.

31. LoPucki, *supra* note 1, at 611-14.

tinely notify the secured party of record that its debtor plans to merge. Or corporate law might be amended to accomplish the same result indirectly. If, for example, the law prevented a proposed merger from taking effect until outstanding financing statements are terminated, the debtor would have little choice but to inform the secured party prior to merging. Alternatively, the effectiveness of a proposed merger could be conditioned upon refileing the outstanding financing statements against the surviving corporation.

Although LoPucki does not address mergers generally, the incorporation-based choice-of-law rule he proposes may help resolve some perfection issues that arise in that context. Despite having devoted substantial time, the Study Committee was unable to reach a consensus on whether a financing statement filed against the debtor should remain effective with respect to collateral that a surviving corporation acquires after merging with the non-surviving debtor.³² Part of the Committee's disagreement stemmed from diverging views over whether to impose upon a post-merger lender to the surviving entity the burden of discovering a financing statement filed against the now-defunct debtor, or whether to impose upon the lender to the debtor the burden to discover that its borrower has merged out of existence and to correct the UCC records. Those with concern for the searcher note that although the merger and the identity of the debtor (including its state of incorporation) may be part of the public record, the location of the debtor's chief executive office, where a relevant financing statement might be filed, is not. Under an incorporation-based regime, however, the burden on potential lenders to the surviving entity would be considerably reduced.³³

As with initial filings, the benefits of an incorporation-based rule with respect to maintaining perfected status are apparent. There are, however, some disadvantages. Chief among them is that an incorporation-based choice-of-law rule may engender complex substantive rules that depend on whether the debtor is a registered entity, or a particular type of registered entity. For example, LoPucki suggests that an incorporation-based rule would obviate the need to refile when the debtor corporation

32. PEB REPORT, *supra* note 2, §§ 17.E-F. This question assumes that a security has attached to the property acquired after the merger.

33. The fact that UCC filings vastly outnumber searches of the UCC records, *see* LoPucki, *supra* note 1, at 615, also argues for imposing the burden on lenders to the survivor rather than on those who have filed against the debtor.

changes its name; presumably, the need to refile to maintain perfected status would remain with respect to debtors other than registered entities.³⁴ Similarly, under an incorporation-based rule, a refile might not be necessary following a reincorporation, whereas it might be required in analogous situations, such as the incorporation of a limited partnership.³⁵ These potential statutory wrinkles, although worthy of note, are unlikely to impose costs substantial enough to offset the obvious advantages of an incorporation-based rule.³⁶

FROM A MIXED CHOICE-OF LAW REGIME TO A DEBTOR-BASED SYSTEM: POLITICAL OPPOSITION AND LIKELIHOOD OF NONUNIFORMITY

LoPucki's article is not limited to the question of whether an incorporation-based rule is preferable to one based on the debtor's chief executive office. The article also provides a useful analysis and supporting data that are likely to aid the Drafting Committee in evaluating the larger questions: Are the anticipated benefits of a shift from a mixed choice-of-law regime to a single debtor-based rule (whether keyed to jurisdiction of incorporation or to chief executive office) likely to exceed the expected costs? Will the state legislatures enact a proposed uniform incorporation-based choice-of-law rule?

The Study Committee's *Report* raised the uniformity issue by observing that a single choice-of-law rule based upon the debtor's chief executive office "may affect dramatically the volume of filings in many jurisdictions. The perceived effect may be so great as to engender opposition among filing officers in particular jurisdictions."³⁷ Switching to an incorporation-based system poses the issue in even starker terms. The immediate reaction of virtually everyone with whom we have shared LoPucki's proposal is the same: Delaware will experience a flood

34. The Study Committee contemplated that a new filing generally would be needed to continue perfected status following name changes. See PEB REPORT, *supra* note 2, §§ 17.B-C. The Drafting Committee generally has followed the Study Committee's approach.

35. The "incorporation of a partnership," like a reincorporation, is a transfer of assets from one entity to another.

36. The tension between drawing fine, but complex, lines and effectuating rough justice is a problem that is not unique to choice-of-law issues. See Steven L. Harris & Charles W. Mooney, Jr., *The Article 9 Study Committee Report: Strong Signals and Hard Choices*, 29 IDAHO L. REV. 561, 577-80 (1992-93) (discussing the tension between developing a complex set of rules to create certainty of commercial law and maintaining clarity and accessibility).

37. PEB REPORT, *supra* note 2, § 9.A.2.

of filings, at the expense of other states. Not so long ago, when Louisiana was considering adopting Article 9, the effort to replace Louisiana's parish-based recording system with a state-wide filing system was met with potent, and ultimately successful, opposition from local filing officers. Many fear that state filing officers would mount the same opposition to the proposed change in choice-of-law rules.³⁸

Everyone recognizes that, to some extent, this issue is "amenable to empirical clarification."³⁹ Unlike the rest of us, however, LoPucki began the clarification process. He deserves immeasurable credit for compiling and analyzing the data. Even if his empiricism fails to carry the day, LoPucki has performed a valuable service by informing what otherwise would have been debate premised entirely upon speculation.

LoPucki's data suggest that other states would lose to Delaware, on average, about five percent of their filings, with an estimated annual revenue approaching two million dollars.⁴⁰ We cannot predict whether the data will persuade an otherwise dubious filing officer that fears of losing substantial revenue to Delaware are unwarranted. The sticking point ultimately may turn out to be perception rather than fact. We would not be surprised to hear that some filing officers "just can't believe" that the loss of revenue to Delaware would be as small as LoPucki projects. Moreover, the losses that LoPucki projects are averages; some states, such as those that impose a tax on filings, might expect to incur a larger than average loss.⁴¹ Although LoPucki may well be correct that thwarting the imposition of documentary taxes by moving to an incorporation-based system would be a good result for the Article 9 system, officials in states that impose a tax might vigorously oppose the change nonetheless.

The potential redistribution of revenue is not the only problem; a reduction in the aggregate number of filings in the UCC records will accompany the change from a mixed choice-of-law system to a single, debtor-based choice-of-law rule. For example, inventory financiers who now must perfect by filing in each jurisdiction where collateral is located would be able to perfect by making a single filing in the jurisdiction of incorporation.

38. One person has questioned whether Delaware's filing system has the capacity to process so many more filings.

39. LoPucki, *supra* note 1, at 584.

40. *Id.* at 639.

41. *See id.* at 630-32.

From a cost-savings perspective, the reduction in filings seems desirable. But politically, it may add fuel to the fire.⁴²

The stakes here are much higher than those in the battle between state and local filing offices within a state.⁴³ Maintaining different rules on where to file within a state is far from an ideal situation. It imposes information-gathering costs on those who use the filing system. The third alternative Section 9-401(1) may require the additional expense of a second filing within a single state. Putting aside statutory ambiguities, however, one can definitively determine "where to file" no matter which filing office or offices each state designates.⁴⁴ Not so if disgruntled filing officers convince particular states not to adopt the proposed uniform choice-of-law rule. With non-uniform choice-of-law rules, in many cases no one will know in advance which state's law determines whether a security interest is perfected.⁴⁵

Yet LoPucki flags a potentially even greater problem. Because corporate debtors often can change their domicile more easily than their chief executive office, jurisdictions that adopt the uniform incorporation-based choice-of-law rule might compete for incorporations by enacting non-uniform substantive rules favorable to secured parties.⁴⁶ To some extent, the uniform version could reduce the effect of this nonuniformity by divorcing the law governing perfection from the law governing

42. In the absence of filing data from all 50 states, it may be impossible to estimate the number of filings that would be eliminated by moving to a single choice-of-law rule.

43. The three alternative § 9-401(1) provide a menu from which each state may choose how much local filing it wishes. LoPucki argues for elimination of local filing except for real estate related collateral such as fixtures. LoPucki, *supra* note 1, at 657. As far as we are aware, no individual or group favors retention of local filing, other than one with a direct or indirect interest in the revenues that local filing generates.

44. We do not mean to trivialize the uncertainty costs caused by ambiguities in the existing formulation of the three alternatives to § 9-401(1). For a discussion of the ambiguities, see, e.g., BARKLEY CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* § 2.12, at 2-144 to 2-149 (rev. ed. 1993); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 22-14 (3d ed. 1988 & Supp. 1993).

45. For examples of how this uncertainty can come about, see LoPucki, *supra* note 1, at 646-47.

46. For example, a state might delete § 9-301(1), which subordinates unperfected security interests to the rights of certain lien creditors, buyers, and transferees. AMERICAN LAW INSTITUTE, *UNIFORM COMMERCIAL CODE REVISED ARTICLE 8. INVESTMENT SECURITIES (WITH AMENDMENTS TO ARTICLE 9. SECURED TRANSACTIONS)* (Proposed Final Draft 1994).

priorities.⁴⁷ But this solution, which could exacerbate the problems of conflicting priority rules, is far from ideal.

To date, individual states have largely refrained from adopting non-uniform Article 9 choice-of-law provisions. The change to an incorporation-based choice-of-law rule presents two risks: nonuniformity resulting from particular states refusing to shift to an incorporation-based choice-of-law rule, and nonuniformity resulting from particular states adopting non-uniform rules of substantive law in an effort to attract corporations. Whether those risks warrant rejection of what otherwise may be a desirable rule is a determination the Drafting Committee ultimately will have to make. LoPucki's article enables them to make it with at least some factual basis.

TRANSITION PROBLEMS

Related to the problem of nonuniformity in legislative enactments of Section 9-103 or particular substantive provisions of Article 9 is the nonuniformity that results from delays in adopting statutory revisions. Nonuniformity of this kind has presented problems in the past and will likely do so in the future.⁴⁸ Even if all states adopt the uniform version to take effect on the same effective date, transition provisions would be necessary to deal with the status of financing statements that were properly filed but not in the jurisdiction of incorporation. We commend LoPucki for tackling this problem, and, notwithstanding the federal government's uneven efforts in this regard,⁴⁹ we urge all concerned to keep an open mind about a federal choice-

47. New Article 9 draws this distinction. Compare, e.g., § 9-103(6)(b) (1994) (providing that local law generally governs perfection and priority of a security interest in a security certificate located in the jurisdiction) with § 9-103(6)(f) (providing that the law of the jurisdiction in which the debtor is located governs perfection by certain methods).

48. For example, § 9-103 was amended in 1977 to provide that the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer governs perfection of a security interest in an uncertificated security. The 1972 version provided that perfection of a security interest in the same collateral is governed by the law (including the conflict of laws rules) of the jurisdiction in which the debtor is located. The 1994 version contains a set of choice-of-law rules that differs from both. See U.C.C. §§ 8-110, 9-103(6) (1994).

49. See, e.g., Charles W. Mooney, Jr., *Good Faith Transferees of U.S. Treasury Securities and Other Weird Ideas: Making Federal Commercial Law*, 26 LOY. L.A. L. REV. 715 (1993) (criticizing the United States Treasury Department's efforts to promulgate new regulations covering book-entry Treasury securities).

of-law statute.⁵⁰ Indeed, if federal intervention appears likely, NCCUSL might seek to delay legislative consideration of revised section 9-103 until Congress has acted.⁵¹

PURCHASE MONEY SECURITY INTERESTS

Another issue that may have implications for uniformity as well as for cost reduction is the effect of an incorporation-based system on purchase money financing of equipment. The Study Committee expressed concern that:

[a] change to the "location-of-the-debtor" [i.e., chief executive office] rule might require certain financiers to teach their personnel how to determine where the debtor is located (a determination that may be considerably more difficult than determining where the newly-acquired collateral is) and how to prepare and file financing statements that satisfy the statutory and regulatory requirements of a larger number of jurisdictions.⁵²

LoPucki suggests that determining the applicable law by reference to the jurisdiction of incorporation rather than the chief executive office would ameliorate the problem substantially. The jurisdiction of incorporation is verifiable from the public record and is information that many purchase money financiers obtain in the ordinary course of extending credit. Nevertheless, some purchase money financiers have displayed the same concern about the costs of an incorporation-based rule that the Study Committee expressed in its *Report*.⁵³

LoPucki reports that "[m]any, if not most, UCC filings are purchase money security interests created at the time a manufacturer or dealer sells the collateral to an end user or retailer."⁵⁴ Reducing filing costs for purchase money financiers, both lenders and sellers, would therefore be a particularly effec-

50. For example, under the Market Reform Act of 1990, Pub. L. No. 101-432, § 5, 104 Stat. 963, 973-75, amending § 17a of the Securities Exchange Act of 1934, 15 U.S.C. § 78q-1, the Securities and Exchange Commission has the power to issue preemptive federal regulations concerning the transfer and pledge of interests in securities. One alternative currently under consideration by the Market Transactions Advisory Committee (established under the Market Reform Act of 1990) is a federal choice-of-law rule.

51. Congress might, at the same time, create a filing system for federally chartered registered entities.

52. PEB REPORT, *supra* note 2, at 77.

53. These concerns, which have been expressed to us privately and at Drafting Committee meetings, go not only to the costs attendant to the transition from one choice-of-law rule to another but also to the costs of operating under the incorporation-based rule.

54. LoPucki, *supra* note 1, at 587. A purchase money financier can obtain priority over a competing security interest in the same equipment even if the competing secured party is first to file its financing statement. See U.C.C. § 9-

tive means of reducing the aggregate costs of the filing system. LoPucki suggests that the jurisdiction of incorporation may be less costly to ascertain than the location of the collateral, but his discussion proceeds on the assumption that "the careful secured party will want to look at them to be sure they are in the state."⁵⁵ In fact, as a general matter, purchase money financiers often do not incur the costs associated with visiting the debtor's premises to verify the location of collateral. Apparently they do not perceive a substantial risk in relying upon the debtor for this information.⁵⁶ Nevertheless, the cost of verifying the jurisdiction in which the debtor is incorporated may well be less than the costs of being unperfected when the debtor turns out to have given incorrect information. Moreover, the switch to a single rule, whether based on incorporation or on chief executive office, would eliminate any need to determine whether goods are "ordinary goods" or "mobile goods."⁵⁷

Determining where to file is not the end of the inquiry. Purchase money financiers also must incur the costs of discovering and complying with the filing requirements of the appropriate jurisdiction. Here, LoPucki's data suggest that a change in the choice-of-law determinant from the current mixed system to an incorporation-based system would result in a small (less than three percent) increase in the number of out-of-state filings against corporations.⁵⁸ More refined data, which segregate purchase money equipment filings, might show a somewhat different picture. Moreover, LoPucki's analysis treats every out-of-state filing as equivalent, regardless of which states are involved in the transaction. An equipment dealer in Kansas City, Missouri, might, however, not be indifferent between filing in Kansas and filing in New York.

312(4) (1994). Thus, purchase money secured parties typically do not search the UCC records.

The extent to which the prevalence of purchase money filings accounts for the significant disparity between the number of filings and the number of searches is an empirical question well worth pursuing.

55. LoPucki, *supra* note 1, at 593.

56. One can imagine a class of sellers whose business is entirely local, such that there is at best a trivial risk that the buyer will remove the goods to another state.

57. Under § 9-103(1)(b), the law of the jurisdiction in which the collateral is located governs perfection of a security interest in "ordinary goods," as defined in § 9-103(1)(a). In contrast, § 9-103(3)(b) provides that the law of the jurisdiction where the debtor is located governs perfection of a security interest in "mobile goods," as defined in § 9-103(3)(a).

58. LoPucki, *supra* note 1, at 608.

The largest cost associated with an out-of-state filing probably is the cost of determining how to comply with the peculiar formal requirements for an effective financing statement. Some of these requirements, such as minimum type size, have been created administratively by filing officers. Even nonuniform statutory requirements, such as the need for a tax identification number, impose additional costs on filers. The most efficient solution, and one that the Drafting Committee is considering, may be the development of a standard form of financing statement that every jurisdiction will accept for filing.

Finally, purchase money financiers have expressed concern about maintaining perfection if the circumstances that determine the applicable law change after a financing statement has been filed. Arguably, the movement of collateral is easier to spot than the relocation of a chief executive office, let alone a reincorporation, which is largely a paper transaction. But, as discussed above, an incorporation-based system can address this problem in one or more ways.⁵⁹

CONCLUSION

Consistent with the Study Committee's recommendation, a consensus within the Drafting Committee has emerged in favor of a single debtor-based choice-of-law rule for Article 9 filing. Professor LoPucki's article pushes the envelope beyond that consensus. He has fashioned a cogent and articulate proposal for an incorporation-based choice-of-law rule based on careful analysis, sound assumptions, and empirical data. That proposal also appears to have found preliminary support within the Drafting Committee. To be sure, some underbrush stands between LoPucki's proposal and statutory enactment; in this Commentary we have sought to illuminate it and clear some of it away. But as Reporters for the Article 9 revision project, we appreciate enormously the path that Professor LoPucki has opened.

59. For example, Article 9 might provide that refiling is not required if the debtor merges into another corporation; state corporate law might require notification of secured parties as a condition to merger; state filing offices might agree to notify secured parties of mergers; or private search services might undertake to monitor corporate records to discover mergers. *See supra* notes 30-33 and accompanying text (exploring alternative methods of reducing the burden on secured parties under an incorporation-based choice-of-law rule).

